

Noteworthy New Titles

Development

China In Transformation. Edited by Tu Wei-Ming. Boston: Harvard University Press, 1994. Pp. xxvi, 253. Price: \$14.00. (Paperback). Reviewed by Aaron Xavier Fellmeth.

To understand the law in any police state, look for the crossroads between politics and culture. This formula has particular explanatory power in the People's Republic of China ("PRC"). The Chinese communist leadership has always tried to maintain control of the population while fulfilling promises of equal comfort and happiness. Yet, when either goal is taken to extremes, it becomes incompatible with the other. As a result, the Chinese government has been forced to weaken the law's social control function in order to enhance economic prosperity.

The eclectic notion of "socialism with Chinese characteristics" is, in essence, a political/ideological concession to cultural demands. The Chinese leadership has learned that the law cannot effect political ends independent of culturally acceptable means. While the government of the PRC maintained ideological legitimacy, culture could — to some degree — bend to political needs. However, that legitimacy is deteriorating, and as the government increasingly substitutes law for legitimacy, culture and control will clash in ever more dramatic ways. The cultural meaning of "being Chinese" changed and adapted with the political needs of the Communists until very recently. In modern times the political meaning of "being Communist" will increasingly have to change and adapt to the cultural needs of the Chinese.

China in Transformation is an admirable interdisciplinary effort to understand the evolving meaning of "being Chinese." In the words of Lucian Pye, China is a "civilization pretending to be a state," and a comparatively heterogenous civilization at that. The subject of the compilation is thus an open one, conducive to abstraction.

The introductory essay by Tu Wei-Ming, the editor of the volume and a professor of Chinese history and philosophy at Harvard, is an elegant survey of the trends of a rapidly changing China. He manages to say much about changing Chinese political and popular culture in few pages and in a profound, insightful, and eloquent manner. Most of the other essays in *China in Transformation* are softer philosophical or theoretical treatises about, for example, "modernity," "the search for China's soul," or "the narrative reconstruction of reality." Attorneys, social scientists, and policymakers will have little interest in many of them. Nevertheless, in addition to the introductory essay, two chapters will be of great interest to the aforementioned audience. One is William P. Alford's "Double-edged Swords Cut Both Ways," and the other is Andrew Nathan's and Tianjian Shi's "Cultural Requisites for Democracy in China."

Alford's chapter is an informative analysis of the increasing legalization of Chinese society. He briefly examines five cases in which dissidents brought law suits against the government under the Chinese Constitution or other laws. Naturally, the dissidents lost, but Alford contemplates why they brought the cases knowing their efforts would be unsuccessful. Alford postulates that the PRC's government needs the "trappings of formal legality" to compensate for its waning ideological legitimacy and to convince other nations of its sincere belief in economic reform. While the legal regime may help the Communists achieve this end, it is a "double-edged sword" because the rights offered to individuals may actually be invoked. When a righteous case invokes these rights and they are nonetheless rejected, as occurred in Alford's five examples, the insincerity and hypocrisy of the government becomes obvious. The law can thus *undermine* the legitimacy of the government — quite the opposite of its intent. "In seeking to deploy formal legality for highly instrumental purposes, the regime has unwittingly handed its opponents a keenly honed instrument through which to seek to accomplish their own, very different ends." Alford makes an even more subtle observation when he notes that while one may cheer for the intellectuals, one should note that they, too, are employing the law for instrumental purposes.

The other noteworthy chapter, by Nathan and Shi, contains an excerpt from a large study undertaken in the PRC itself to gauge a wide range of perceptions by the Chinese public. Most of the questions asked relate to political culture (e.g., tolerance for dissenting views) and perceptions of government effectiveness. Nathan and Shi compare their results with similar surveys from other nations and imply that the Chinese are a remarkably intolerant people with comparatively little understanding of how their government affects their lives. Although the results of their survey indicate that China is a long way from becoming a democracy, Nathan and Shi take an optimistic view that is somewhat at odds with their data. "Some patterns in the data suggest potential difficulties if the Chinese political system begins to democratize. . . . When compared to residents of some of the most stable, long-established democracies in the world, the Chinese population scored lower . . . but not so low as to justify the conclusion that democracy is out of reach." Actually, according to their data, the Chinese often scored *much* lower than the second-lowest country in some of the variables most important to democracy (particularly in political tolerance); moreover, not all the countries compared were "stable, long-established democracies." Mexico and Italy could hardly be called either stable or long-established democracies. Germany's democracy might be stable, but it is not "long-established" unless one considers fifty years a long time. Nevertheless, putting aside the authors' euphemism, their chapter is well-researched, informative, and above all important. Anyone interested in Chinese politics should read it.

China in Transformation is an admirable effort to bring together disparate disciplines to explain a slippery phenomenon. On the whole, the volume cannot be considered required reading, but a scholar of Asian studies who never picks it up will miss much of value.

General International Law

Justice in International Law. By Stephen M. Schwebel. Cambridge, England: Cambridge University Press, 1994. Pp. xiii, 630. Price: \$145.00. (Hardcover). Reviewed by Aaron Xavier Fellmeth.

Stephen Schwebel, while legal advisor to the U.S. State Department, represented the United States in *United States v. Iran* (the Carter-era hostages case), before the International Court of Justice ("ICJ"). Schwebel later became a judge of the ICJ and issued a famous dissent to the Court's exercise of jurisdiction in *United States v. Nicaragua*. He has also published more than one hundred scholarly articles, comments, and book reviews. As a judge and scholar, Schwebel has assured his place in the history of international law.

Schwebel's collection is not really about justice in international law. A more accurate title might be *Stephen Schwebel's Greatest Hits*. Perhaps reflecting his disparate professional experiences, *Justice in International Law* is really a disparate compilation of his best writings on five broad subject areas: the jurisprudence of the ICJ, international arbitration, the United Nations, international contracts and expropriation, and a final part that the book calls "aggression under, compliance with, and development of international law."

Schwebel's approach is always characterized by faith in the desire of states to develop an international jurisprudence, tempered by a realistic assessment of the political limitations of international law. Schwebel cannot fairly be called either a skeptic or a pragmatist although his years at the U.S. State Department may have bridled his personal optimism about the limits and possibilities of international law. After all, Schwebel worked for the State Department during the idealistic Carter years, not during the Reagan years of political realism; the difference is apparent in the tone of his articles and comments.

The quality of Schwebel's articles is consistently high. Schwebel tackles each subject with depth, nuance, and humanity. When discussing cases that came before him on the ICJ, he displays admirable tact and restraint, sometimes making his true position on issues that have come before the ICJ during his tenure difficult to discover. Schwebel's comments sometimes devolve into catalogues of cases and their fact patterns supporting his interpretation. Nevertheless, the volume is a useful and interesting resource that contains something for every student of international law.

Human Rights

Human Rights of Women, National and International Perspectives. Edited by Rebecca J. Cook. Pennsylvania: University of Pennsylvania Press, 1994. Pp. xxxiv, 634. Price: \$19.95. (Paperback). Reviewed by Susanna Lee.

This collection of essays, which originated in the 1992 Consultation on Women's International Human Rights at Toronto, explores the legal

relationship between international human rights and women's rights. The contributors to this volume believe that human rights law, in its present form, fails to consider and respond to the conditions of women. This failure, widespread and largely unacknowledged, calls into question the universality and justice of international human rights law. Against this backdrop, the essayists proceed to examine the ways in which the conditions of women might be improved by international law communities and societies throughout the world.

The opening section considers both theoretical and practical uses for a human rights perspective to address the particular sufferings of women. Radhika Coomaraswamy's "Women, Ethnicity, and the Discourse of Rights" and Rhonda Copelon's "Understanding Domestic Violence as Torture" question the phenomenon of dividing societies into private and public spheres. Such division, they argue, has placed wrongs against women carefully — and unjustly — beyond the reach of international human rights law and, consequently, has restricted our expectations of international law's possibilities.

The second section examines international and regional approaches to the question of women's rights. Contributors are concerned with establishing state accountability and responsibility to international law; eliminating conflict with religious or customary law; and, where necessary, amending international law to prevent such conflicts and address injustices currently ignored or unattended. Abdullahi Ahmed An-Na'im, president of the International Third World Legal Studies Association, in a particularly interesting discussion of Islamic law and tradition, proposes a theological and jurisprudential framework that would allow international human rights law to coexist with religious custom.

The third section, dedicated to national implementation of international law, explores persistent inconsistencies between standards and enforcement of women's rights. An introductory chapter considers, in general terms, the scope of judicial review, concepts of democracy, and the relationship between municipal and international law. Chapters on obstacles to women's rights in India and the Sudan, structural adjustment programs in Ghana, and approaches to gender equity in Canada follow.

A final section, entitled "Guaranteeing Human Rights of Particular Significance to Women," describes specific and practical ways to apply international law to women's lives. One chapter, written by Florence Butegwa, considers the African Charter on Human and Peoples' Rights as a tool for insuring women's access to land. Another chapter proposes that the reproductive rights of Colombian women be regarded as human rights. The final chapter suggests that international human rights law be used to eliminate violence against women prisoners of war, asylum seekers, and refugees, as well as to address violence associated with pornography, prostitution, and sexual harassment.

The contributors to this volume are consistently careful with the typical oppositions of East and West, of progressives and nonprogressives. They do not seek to prescribe, but rather to propose modes of dialogue between women's communities and international human rights law.

Child Soldiers: The Role of Children in Armed Conflicts. By Guy S. Goodwin-Gill and Ilene Cohn. Oxford: Clarendon Press, 1994. Pp. viii, 228. Price: \$19.95. (Paperback). Reviewed by Emma Lewis.

On guard in Guatemala, a sleepy child holds a gun; an eleven-year old Ugandan boy gazes with hostility, his machine gun casually pointed at the observer; a ten-year old girl poses shyly in a group photo of Saddam's Youth. Such photos introduce each chapter of *Child Soldiers* and provide shocking testimony to the chilling reality of children in war. This book, which was conceived at a 1991 Conference on Children in War in Sweden, presents in clear, well-organized prose the issues surrounding minors involved in armed combat. Guy Goodwin-Gill, Professor of Law at Carleton University in Ottawa, and Ilene Cohn, Research Director of the Project on Children and War at the Center for the Study of Human Rights at Columbia University, have conducted interviews and first-hand research, in addition to gathering information from available studies, to offer this relevant overview. Some of their objectives, accomplished thoroughly in this concise volume, are to describe the nature and scope of the problem; to enumerate the many factors (cultural, religious, material, coercive) leading to the participation of minors in war; to evaluate the consequences; to detail the available remedies and gaps in international law; to describe current attempts at change; and to offer ideas for amelioration and further study of the problem. Other studies on this topic exist, but the most useful were written as long as ten years ago, and tragically, this is a phenomenon that persists and grows.

While some children are forcibly conscripted, others join voluntarily for many reasons. The authors note, however, that "whenever the use of children [i]s deliberate, the strategy [i]s seemingly based only on the expendability or the exploitability of children." Thus, minors have been used in Iran to traverse minefields in front of troops. In Zimbabwe, an officer explained that children can move about more easily than adults. The Khmer Rouge of Cambodia and RENAMO in Mozambique realized that young people, because of their impressionability, can be transformed through brutal training into vicious warriors, and others have capitalized upon the loyalty of the young. Many youths join voluntarily because they see no future at home. Moreover, school closings and the empty life of refugee camps breed restlessness and boredom, and the army offers a way out; social milieus put pressure on children to volunteer; many have witnessed horrendous brutalities and seek revenge; and some have internalized nationalistic ideologies and are compelled by political passions. The authors argue persuasively that because of the children's ages, "volunteering" does not truthfully describe their induction. Children are manipulated and influenced by those around them, often aroused by demonstrations at school and on the streets, and seldom understand what such participation involves.

Little is known about long- or short-term consequences because most child soldiers are kept away from outsiders. Some studies, however, indicate that severe stress disorders like recurring flashbacks, sleeplessness, and anxiety often develop. Not surprisingly, those youths who commit acts of

debilitate children, making life obstacles yet more formidable. Children also end up in POW camps, and, in the cases of Irani and Ethiopian child soldiers, their own governments abandon them thereafter. Families and communities sometimes reject demobilized children; tainted by their violent experiences, they are pariahs, unwelcome and often homeless.

Goodwin-Gill and Cohn provide a comprehensive summary of current standards and protocols in international law that touch on issues of children in war. International law remains murky, unreliable territory because of the lack of enforcement and the erratic nature of compliance and ratification. The authors do an impressive job, however, of cataloguing the law as it exists today, drawing on Common Article III of the Geneva Conventions, the Additional Protocols (I and II) of 1977, the views of the International Committee of the Red Cross, and the Convention on the Rights of the Child. They provide current readings of these conventions and present a persuasive way of interpreting them to increase restrictions on the use of children in combat. Further, the authors insist that because the issues of child soldiers are issues of humanitarian and human rights law, customary international law should govern them. As the vast majority of countries have a compulsory recruitment minimum of eighteen years of age, the clear message of such current international norms is to discourage or forbid any participation of minors.

Finally, the authors review various undertakings aimed at limiting or stopping minor participation (such as consciousness-raising projects in Guatemala) and activities to aid child soldiers (like community training schools in El Salvador, which address psychological problems). They then suggest further avenues to effect change. Besides advising general guidelines like international donor pressure and public opinion, the authors offer more concrete ideas, like the need for a database to keep track of child soldiers. An extensive chart at the back of the book provides information on every available country, detailing "Ratification of the Convention on the Rights of the Child, International Humanitarian Law and Human Rights Instruments, and Voting Age and Military Age."

Child Soldiers is well written, informative, and powerful. Goodwin-Gill and Cohn express the hope that their endeavors will launch further inquiry and action, and this instructional publication provides abundant opportunities and incentives to continue their efforts.

The Best Interests of the Child: Reconciling Culture and Human Rights.

Edited by Philip Alston. Oxford: Clarendon Press, 1994. Pp. xiii, 297.

Price: \$29.95. (Paperback). Reviewed by Steve Dargitz.

Article 3(1) of the United Nations Convention on the Rights of the Child provides that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." This volume collects various interpretations of that sentence, particularly the phrase "the best interests of the child." Aside from

the obvious question of who determines those interests, the phrase is indeterminate in several other ways. For example, "child" is often interpreted as representing a class, rather than an individual, and the class being protected may shift according to circumstance. Also, which interests (e.g., economic, social, political) are "best" for the child? The wealth of diverse viewpoints represented in this work demonstrates that the phrase is subject to several credible interpretations.

The first three essays are fairly abstract, while the remainder of the book applies the "best interests" principle to specific situations. Philip Alston lays out the history of the UN convention, most significantly the use of the phrase "primary consideration" over "paramount consideration" in Article 3(1) of the Convention. Stephen Parker's essay examines in detail the indeterminacy of children's rights norms. After first pointing out that rational choice theorists base their explanations on assumptions of questionable validity, Parker claims to strengthen the explanations of critical legal theorists by combining them with an argument of philosopher Saul Kripke. Kripke's thesis is that a statement of a rule can be supported by only a finite number of examples. These examples, in turn, can be used to support an infinite number of rules. Rule-following, then, becomes "a highly interactive enterprise" in which legal actors look to communal conventions to decide which rules to follow. In the context of children's rights, the predictive element of a rule becomes weaker and the social element stronger as the rule dilutes "a strong best interests standard."

In a psychological vein, John Eekelaar promotes what he calls "dynamic self-determinism," which he contrasts with "objectivization." Eekelaar's argument is essentially one for creating an environment in which allowing children to make choices and take responsibility enhances their potential for self-actualization. Eekelaar concludes that the real danger to self-determinism is a crude form of objectivization that denies children their status as individuals.

Abdullahi An-Na'Im uses two lines of argument to caution against normative universality. His democratic argument is that children's interests should be determined in the most legitimate way possible — a difficult task made more difficult by the paucity of pressure groups speaking for children's rights. His pragmatic argument is that reforms will not last unless they are effected by the grassroots, not an elite bureaucracy. A less pessimistic Akila Belembaogo emphasizes that the judiciary's ability to form workable doctrine will determine whether or not legislative action in Burkina Faso is effective (e.g., in prohibiting facial scarring and female circumcision).

Bart Rwezaura finds that poverty in Sub-Saharan Africa leads societies there to conclude that the best interest of the child is survival. Thus, societies keep children close to sources of money (i.e., fathers), even when the legal regime calls for maternal custody. Rwezaura also examines the preferential treatment of boys. Because the extended family loses the children of a married daughter and retains those "bought" by its sons through the bride price, families tend to invest more in their sons. However, as families realize that an educated woman can bring a higher bride price due to her income-earning potential, they may begin to invest more in their daughters' education.

Other essays outline the struggle to contextualize the best interests principle in India, Egypt, and Japan. The volume does not speak exclusively to the non-Western world: Jacqueline Rubellin-Devichi shows that the European Court of Human Rights has also shamed France into action.

This collection of thoughtful essays should spark further discussion on the "best interests" principle. More generally, these authors provide focused studies of the link between culture and human rights.

History

Fontes Historiae Iuris Gentium: Sources Relating to the History of the Law of Nations. Edited by Wilhelm G. Grewe in cooperation with the Institute of International Law at the Free University of Berlin. Berlin and New York: Walter de Gruyter, 3 vols. Vol. I, 1995. Pp. liv, 754. Price: \$499.00; Vol. II, 1988. Pp. xxviii, 741. Price: \$356.00; Vol. III, 1992. Part 1. Pp. xlvi, 681. Price: \$356.00. Part 2. xlv, 657. Price: \$356.00. (Cloth). Reviewed by Bardo Fassbender.

These volumes constitute a major reference work for those interested in the history of public international law. They make up a comprehensive collection of the most important sources relating to the law of nations from antiquity to the end of World War II. The significant academic accomplishment that they represent may also induce students of contemporary international law to give greater consideration to an issue's historical roots, thereby developing a deeper understanding of it.

The editor, Wilhelm G. Grewe, is a retired professor of law at the University of Freiburg in Breisgau and a former member of the International Court of Arbitration in The Hague. While a German ambassador, Grewe represented his country in Washington and Tokyo, and at NATO Headquarters. In 1984, he published his book *Epochen der Völkerrechtsgeschichte* (Epochs of the History of International Law), which constitutes the theoretical basis of the present collection of sources. Professor Grewe convincingly argues that the "chain of international legal norms" that led to our contemporary, universal law of nations can be traced back only to Western Europe in the late Middle Ages. Before that time, and outside of Europe, systems of international law are found only as exceptions.

The editor chooses a broad definition of what constitutes a "source of international law." He includes not only treaties between states (in particular treaties of peace and of commerce), diplomatic correspondence, and unilateral declarations (as in declarations of war or neutrality), but also domestic legislation (e.g., statutes regarding the status of foreigners or the expropriation of foreign property) and maritime documents (such as letters of marque and reprisal). Writings of individual authors are generally excluded. Thus, this edition emphasizes the practice of states rather than the history of ideas and doctrines. It reflects how scholarly theory and the state practices have influenced each other in the development of international law, and how the law ultimately depends on politics.

The texts, comprised mostly of excerpts, are arranged by historical periods and common fundamental issues. These issues include the basic characteristics of a given period of international law, sources and subjects of the law, adjudication, enforcement, and the distribution and government of territory. Additional chapters deal with problems particular to a single period.

More than two thirds of Volume I of the *Fontes* discusses Europe in the Middle Ages. Volume II assembles sources from the "Period of Spanish Supremacy" and "French Supremacy," and Volume III, Part 1, features "The Age of England." Volume III, Part 2, includes sources originating in "The Anglo-American Transitional Period." Professor Grewe's periodization is certainly Eurocentric, but this fact merely reflects the historical origins of currently dominant Western-liberal legal norms. The literature on international law in, for example, Ancient Asia, North America, and Latin America before European colonization is still too sparse for him to have included comparable sources.

The documents are published in three columns. On the left side, the document appears in its original language. To the right are both English and German translations (when necessary). If official or private translations are available, the editor has reproduced those. In a number of cases, "summary translations" convey the essential contents of a text. This arrangement makes the material more accessible.

The wealth of historical material from which international legal research can benefit is immense, but this mass of documents can be daunting. Professor Grewe directs our attention to both the structural essence and the preeminent sources of law from each historical period. As a work of reference and a starting point for further research, the *Fontes Historiae Iuris Gentium* is unparalleled.

Trade

International Trade and Intellectual Property: A Search for a Balanced System. Edited by George R. Stewart, Myra J. Tawfik, and Maureen Irish. Boulder, CO: Westview Press, 1994. Pp. xv, 195. Price: \$55.00. (Hardcover). Reviewed by Marinn F. Carlson.

In the wake of global market integration, and in an era when high-end technologies often determine national competitiveness, intellectual property rights have moved to the forefront of international trade negotiations and altercations. The GATT Uruguay Round and NAFTA agreements both featured intellectual property commitments, while copyright enforcement disputes recently sparked trade brinkmanship between the United States and China. *International Trade and Intellectual Property* surveys a number of the relevant laws, agreements, and policy debates in this area.

This collection of papers from a 1993 conference at the University of Windsor is not a cohesive primer on the trade dimensions of intellectual property; rather, it represents a series of discrete windows onto trademark, patent, and copyright law in several regional and multilateral trading contexts.

While the papers regrettably pre-date the final texts of either the NAFTA or the Uruguay Round, they remain valuable as solid sources of information.

A first group of authors focuses on regional trading blocs, intellectual property rights, and the specific case of rules on parallel importation (also known as trade in "grey market goods," which carry genuine trademarks but are imported or marketed against the wishes of the trademark owner). Megeed Ragab and G. Andrew Gostlow's empirical study of parallel importation in a U.S.-Canadian border community is complemented by Myra Tawfik's review of the two countries' grey-market laws. Ysolde Gendreau reviews trends in European Community parallel importation law. Turning to intellectual property issues more generally, Mauricio Jalife Daher relates recent Mexican economic history to changes in that country's intellectual property laws while José Luis Caballero Leal details the laws' provisions.

A second set of authors considers intellectual property rights in multilateral settings such as the GATT and North-South trade. Donald deKeiffer traces intellectual property's rise to U.S. trade policy prominence and outlines the (then-probable) intellectual property provisions of the NAFTA. Ted McDorman turns to the GATT negotiations and assesses prospects for moving from unilateral to multilateral settlement of intellectual property disputes. Scott Fairley's sidebar on other U.S. assertions of extraterritorial jurisdiction complements the McDorman discussion of unilateralism. As the GATT attempts to harmonize intellectual property protections, David Silverstein and Maureen Irish question the appropriateness of Western intellectual property models for use in less developed countries.

International Trade and Intellectual Property introduces a variety of topics, perspectives, and factual analyses that will certainly make a valuable contribution to the burgeoning supply of information on the subject.

Measuring the Costs of Protection in Japan. By Yoko Sazanami, Shujiro Urata, and Hiroki Kawai. Washington, D.C.: Institute for International Economics, 1995. Pp. xi, 76. Price: \$15.95. (Paperback). Reviewed by Ashwini K. Chhabra.

This new treatise by three leading Japanese economists gives the reader a glimpse of the effect of Japanese trade protectionism on a forgotten victim — the Japanese consumer. *Measuring the Costs of Protection in Japan* is written as the companion volume to Gary Clyde Hufbauer and Kimberly Ann Elliott's *Measuring the Costs of Protectionism in the United States* (1994). The authors of this volume — Yoko Sazanami of Keio University, Tokyo, Shujiro Urata of Waseda University, Tokyo, and Hiroki Kawai of the Japan Center for Economic Research — provide a highly empirical cost-benefit analysis of the effects of Japanese trade barriers on the nation as a whole. The study's main contribution, however, is the calculation of this cost to society — which may be larger than anyone had previously assumed.

The book brings forth the fact that Japanese tariff and nontariff barriers result in a cost of \$75 to \$110 billion (in 1989 dollars) to Japanese consumers, a benefit of \$50 to \$70 billion to protected Japanese producers, and a benefit

of a mere \$2 billion to the Japanese government in the form of tariff revenues. The net cost to Japanese society amounts to \$8 to \$17 billion each year. Although these results only confirm what American economists have been saying for decades, the new data provide something tangible to use in future trade negotiations. The data also lend support to another belief that American economists have long held and American trade negotiators have repeatedly voiced, that Japan stands to gain more from free trade than the United States. Whereas U.S. per capita gains from free trade in highly protected industries would amount to \$130 (in 1989 dollars), Japanese gains would total \$890 per capita.

While this book presents little in the way of new theories on the effects of protectionism, it does provide valuable data that demonstrates the extent to which prevailing theories are correct. Together with Hufbauer and Elliot's companion volume on the effects of American protectionism, this study provides a clear picture of the present U.S.-Japanese trade relationship and a view of the potential for gain from free trade.

Litigation

Essays in International Litigation and the Conflict of Laws. By Lawrence Collins. New York: Clarendon Press, 1994. Pp. lii, 466. Price: \$75.00. (Hardcover). Reviewed by Adam Benjamin Farlow.

Essays in International Litigation and the Conflict of Laws is a collection of more than two decades' worth of essays on topics related to conflict of laws. The author, Lawrence Collins, is a solicitor in London, a visiting professor of law at Queen Mary and Westfield College in London, a fellow of Wolfson College, Cambridge, and a member of the Associé de l'Institut de Droit International. He speaks with experience, disclosing cases in which he was personally involved. This wealth of experience leads the author to focus on issues of particular interest to him.

The analysis is case-oriented and tends to focus on practical topics often neglected in the usual texts on conflict of laws. While wide-ranging in scope, the collection is better suited to those versed in the field than to the general reader, as the topics selected for presentation are not comprehensive. The topics included, however, are tremendously well researched and documented. Unfortunately, while many foreign terms are translated, whole blocks of French text are not. Also unfortunate is that none of the cases and pieces of legislation cited comes from national courts outside of Europe, the Commonwealth, or former Commonwealth countries, as did few of the arbitration awards.

The essays were written over a period of two decades, though most are of recent vintage. To reflect the author's perspective during a given period, the selections are presented without revision. However, useful introductions and postscripts accompany each essay. By outlining developments since the original publication, these notes bring the essays into current relevance.

The topics are almost exclusively commercial and civil. Most essays

discuss provisional and protective measures that courts in various fora use to aid courts or arbitral panels to reach and enforce settlements. The author compiled this section from a series of lectures delivered at The Hague in 1991. The essays devote much attention to the use of so-called "*Mareva* injunctions." English courts developed the *Mareva* injunction to enable them to enforce judgments or awards against those who face a loss of assets when found in default or in breach of fiduciary duties. This type of injunction freezes assets both inside and outside the United Kingdom. The author contends that disclosure orders, which concern where the assets are held, tend to be more useful than the *Mareva* injunction itself because disclosure orders allow creditors to attach the property in other jurisdictions through local courts.

Throughout this work, the author discusses how alternative dispute resolution mechanisms like arbitration interact with the courts, especially with respect to court-ordered interim measures. The author appears to be pro-arbitration but sees a need for judicial interference to aid arbitration's efficacy.

The remainder of the book deals with other ways national courts, arbitration panels, and international bodies interact with each other and how they interpret various international treaties and conventions. The author gives thorough treatment to the Brussels Convention of 1968 and the Lugano Convention. A few of the other essays also discuss different aspects of territorial reach and jurisdiction (e.g., blocking and clawback statutes), receivership across borders, and various procedural difficulties.

Philosophy

American Hegemony. By Lea Brilmayer. New Haven: Yale University Press, 1994. Pp. xi, 224. Price: \$30.00. (Hardcover). Reviewed by William H. Jones II.

Events since the end of the Cold War have caused Americans to re-examine the proper role of the United States in the world community. Most analyses of the role of the United States in the post-Cold War world focus on the status of the nation as the last remaining superpower, considering questions such as whether the United States should or even could be more active in its role given the diminished Soviet threat and its own domestic ills. *American Hegemony* differs from these earlier analyses in that it focuses on the moral legitimacy of American power in the world. Lea Brilmayer points to America in the late twentieth century in addressing the question of whether one nation can ever morally and legitimately exercise dominance over the rest of the world.

Brilmayer argues that the legitimacy of hegemony should be examined in a manner similar to the way the legitimacy of domestic governments is examined. The success of her main argument depends on her supporting argument — that the international community actually is analogous to domestic society.

The book argues that American hegemony should be judged against liberalism, the general consensus underlying American government. The author examines several liberal justifications for international domination by one nation. These justifications include consent to domination by the nations under the hegemon and the defense of human rights by the hegemonic power. Brilmayer also discusses potential objections to these justifications of international dominance in turn.

The liberal arguments lead to other discussions. For instance, Brilmayer compares the formal organization of the international community with its practical realities and speculates upon the duties of more powerful nations to less powerful ones.

The book also summarizes various theories in the field of international relations and discusses the works of many commentators on international affairs. These supplemental views place Brilmayer's arguments in a broader perspective.

Ultimately, *American Hegemony* provides a plausible explanation within liberal theory of when the United States, or any major power, should exert its force in the world. The book is thus an interesting addition to the burgeoning literature concerning America and its place in the world.

Environmental Law

Killing Game: International Law and the African Elephant. By David Harland. Westport, CT: Praeger Publishers, 1994. Pp. ix, 219. Price: \$57.95. (Hardcover). Reviewed by Todd M. Millay.

The African elephant is in trouble. Africa's elephant population declined by half over the past two decades and in some countries vanished completely. David Harland argues that international law can be a powerful tool to protect the elephant and other threatened species, but only if the "factors of compliance" that induce nations to obey are understood.

Killing Game: International Law and the African Elephant is insightful and refreshingly free of dogma. Harland carefully evaluates the successes and failures of international conservation efforts. Though the conservation community is torn between supporting strict preservation and favoring a sustainable-use approach, he argues that supporting only one method is naive. Any attempt at conservation must be rooted in the particular local circumstances, as Africa is a particularly complex and diverse continent.

The two principal threats to the elephant are poaching and habitat loss. While strict preservation has been effective in bringing poaching to a halt, the much graver long-term threat is habitat loss. To counter this risk, local communities must begin to view wildlife as a resource rather than a competitor for land resources. Only then will they have an interest in preservation.

In Part I, Harland outlines how and why the international community has used law to protect the elephant. Nations have an interest in a functioning body of norms and in preserving these norms even though a specific rule may

be against their interests. Nations violate international law when there are not enough incentives to comply, especially when the violation will go unnoticed. Because violations of wildlife law are seldom detected, efforts to gain compliance must be rooted in a nation's deeper self-interest. Harland argues that three major "factors of compliance," biological, economic, and political, influence whether a country will comply.

To be effective, law must take into account the biology of the species it attempts to protect. Elephants are huge and need to graze continuously. They like to eat crops and migrate over large areas regardless of state borderlines. Elephant habitat also tends to be good land for agriculture. Human population pressure on elephant habitats increases daily in Africa, creating competition for scarce resources. Laws protecting elephants must take these factors into consideration if they are to be successful.

More dramatic than habitat loss is the slaughter of elephants by poachers. Both male and female African elephants bear ivory, though the males tend to be much larger and have bigger tusks. The only way for a poacher to remove these tusks is to kill the elephant. The ivory may have a "chemical fingerprint" that betokens its geographic place of origin. Effective detection of this fingerprint by law enforcement agencies would make it more difficult both for the poacher to launder illegal ivory and for a nation to avoid responsibility.

Economic strategies for conservation should maximize the long-term value elephants provide. Harland cautions that the economic approach has limits. The economic value of a species must include its aesthetic and cultural value. Harland finds a "hypothetical bias" to computing the "contingent valuation" (the price people would pay for a species if it were traded in a marketplace) of an elephant because the valuers know that they will not actually have to pay this price. Other methods of assigning economic value include the "option value" and "travel cost" methods. Local communities currently enjoy few of the benefits of preservation, while they bear many of the costs. Indeed, poaching is a classic example of the tragedy of the commons because poachers have no incentive to conserve for the future. According to Harland, an effective legal mechanism must internalize the benefits of conservation to local communities, secure tenure rights on specific animals, or eliminate the market. The last option has been accomplished through an international ban on ivory trading, but the ban does not halt threats to the elephants' habitat.

Harland next explores the political factors of conservation. He examines the will and ability of key players — Southern Africa, Africa north of the Zambezi, Europe and North America, East Asia, and the entrepôt states to comply with international preservation law. In this context, he also demonstrates the power of nongovernmental organizations to organize political support and set the terms of debate.

Part II examines the current status of the elephant in international law. Harland asserts that policymakers are using international law more wisely, but that much room for improvement remains. He gives the reader an historical perspective on the trade in elephant products, noting that ivory has been coveted for twenty-five centuries. Traders have employed three strategies to monopolize supply and thereby control the market: tribute-trading, licensing,

and regulation. All have failed. The great innovation of the twentieth century was the discovery that the best way to control international trade in ivory is to control the demand in consumer markets. The 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") adopted this strategy. It lists species in three "appendices," with Appendix I listing those species completely banned from international trade. When the elephant was upgraded to Appendix I after the seventh CITES conference in 1989, the ivory market crashed. This reaction demonstrates that affluent importing countries can control trade flows out of poor exporting countries. Many object to listing the elephant in Appendix I, however, claiming that it is an imposition on national sovereignty, that it is shortsighted because it does not address habitat loss, and that it punishes countries that successfully manage their elephants. Moreover, they claim that elephants must generate income for local Africans to merit preservation. An important legal objection to elephant's Appendix I listing is that a species must be "threatened with extinction" to be so listed. The African elephant is not.

At the eighth CITES conference in Kyoto, Japan (1992), delegates recognized that the trade ban in effect made nations in Southern Africa pay for the incompetence of other countries with elephant populations. International law is moving in the direction of sustainable use. While the delegates accepted the Southern African sustainable resource proposals in principle, specific species, including the elephant, were not downgraded. Harland argues that this fact demonstrates that a species' "following in the nongovernmental community" is important and shows the power of nongovernmental organizations to affect international conservation law.

Harland concludes his thoughtful discussion by emphasizing that international law must take all three factors of compliance into account. Trade is a double-edged sword — it opens the door to poaching but prevents habitat loss by providing economic rewards to local communities for accommodating wildlife. Unfortunately, the destruction of habitat is much less dramatic than poaching and therefore less likely to arouse an effective response. Harland proposes a scheme for an international conservation regime involving limited trade. He argues that the elephant has a better chance with limited Southern African trade, a regulated import market, and a blanket ban on ivory from north of the Zambezi. Harland fears, however, that the prospects for successful reform are dim, and his book ends with a gloomy prediction for the future of the African elephant.

Development

State and Law in the Development Process: Problem Solving and Institutional Change in the Third World. By Ann Seidman and Robert B. Seidman. New York: St. Martin's Press, 1994. Pp. vii, 413. Price: \$45.00. (Hardcover). Reviewed by Susan Torres.

This scholarly work significantly contributes to the existing law and development literature by investigating how law and institutional change can be instrumental determinants of the third world's future. Ann Seidman, Adjunct Professor at Boston University Law School, and Robert B. Seidman, Professor of Law and Political Science at Boston University analyze the conditions that led to third world underdevelopment and provide practical and theoretical guidelines for transforming legal structures into vehicles of social and political change.

The authors' main goal is to discover why development programs in the third world consistently fail to address adequately the poverty and powerlessness afflicting the great majority of those living in third world countries. They present many striking examples of a perplexing paradox: amidst the plentiful natural resources and great wealth available to a few, many third world nations are unable to provide a large part of their populations with adequate living conditions. In the years since these countries gained independence, they have implemented numerous and varied development programs with much enthusiasm. These programs, however, only resulted in greater inequality and less growth. The Seidmans' research posits that the law can best address these problems. They argue persuasively that legal and institutional change is the key to development in the third world. Only a restructuring of the law, vigorously implemented, can achieve real economic and social progress. They argue that the empowerment of the poor and marginalized will come from new institutions created as part of systematic and well-planned legal reform.

The authors also explain why current institutions function inadequately and why institutional reform is therefore necessary. First, they discuss what they call the "Law of Reproduction of Institutions." This notion emphasizes organizational inertia, which resists piecemeal and superficial reforms. The authors show that although post-independence governments did not significantly alter most of the colonial institutions they inherited, the newly-formed nations were not benefited by these inheritances because the old structures were ill-equipped to deal with the needs of the new societies. What did change was the character of those in power. New leaders and officials took over the existent institutions but were impotent to effect true social change because they did not reevaluate the underlying system. The Seidmans label this problem the "Law of Nontransferability of Law:" simply changing leaders and/or adopting the laws of another nation will never create a successful legal order in the third world. Decades spent adopting the development strategies and governmental systems of the so-called "developed countries" has resulted in disaster precisely because these imported solutions do not take into account the peculiar needs and cultural contexts of most third

world nations.

Next, the authors turn to a discussion of the appropriate theory to guide development. First, they support a problem-solving methodology, guided by reason and informed by experience that allows for flexible institutional structures able to change according to current needs. In addition, their method would allow for broad participation by various sectors of society. Second, the authors suggest the use of "transforming institutionalism," through which a government would employ the legal order to alter class relationships and to alleviate poverty and oppression.

Finally, the Seidmans discuss categories of influence, such as rules, interests, and ideologies, that encourage people to act in certain ways. With these categories in mind, they are confident that reformers can create a legal order to alter and guide social behavior. By means of illustration, the authors note that the development of the bureaucratic bourgeoisie, which perpetuated inequality in many third world nations, was encouraged by laws and institutions that had previously supported the colonial elite. They also emphasize the importance of reinventing the educational system to bring about new political and social institutions.

Throughout their analysis, the Seidmans provide a healthy mix of empiricism and theory, though at times the theory is a bit abstract. Overall, *State and Law in the Development Process* provides a comprehensive guide to development in the third world. Its focus on the role of law and institutions recognizes that reform must begin at the core of society in order for those most in need to feel the reform's consequences. Most important, the authors demonstrate how third world nations can, if they so choose, shape their own destinies.

